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Supreme Court, U.S.
FILED

No. _____

05 - 922 JAN 20 2006

In The OFFICE OF THE CLERK
Supreme Court of the United States

RICHARD KLEINHAMMER,

Petitioner,

vs.

ERNEST ROE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must the Court of Appeals grant a certificate of appealability where the district court denied his petition for writ of habeas corpus where petitioner has raised a non-frivolous claim that the court had a sua sponte duty to stay his initial petition which contained both exhausted and unexhausted claims?

Must the Court of Appeals grant a certificate of appealability where the district court denied his petition for writ of habeas corpus where petitioner has raised a non-frivolous claim that his petition was improperly dismissed because he was affirmatively misled as to his options with respect to his mixed petition?

Must the Court of Appeals grant a certificate of appealability where the district court dismissed his petition for writ of habeas corpus where petitioner has raised a non-frivolous claim that he was entitled to equitable tolling under principles declared by this Court and *en banc* authority of the Ninth Circuit Court of Appeals?

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PETITION FOR A WRIT OF CERTIORARI

Richard Kleinhammer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case denying his request for the certificate of appealability.

OPINION BELOW

The order of the Ninth Circuit denying the certificate of appealability is attached as an Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals issued its order on October 24, 2005 denying petitioner's motion for reconsideration of the denial of his request for a certificate of appealability under 28 U.S.C. § 2253(c)(2). Petitioner requested the certificate to review the district court's denial and dismissal with prejudice of his petition for writ of habeas corpus under 28 U.S.C. § 2254. The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). *Hohn v. Mayo*, 524 U.S. 236 (1998).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2253 reads:

- (a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of

appeals for the circuit in which the proceeding is held.

- (b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offence against the United States, or to test the validity of such person's detention pending removal proceedings.
- (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --
 - (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 - (B) the final order in a proceeding under section 2255.(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
- (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).



STATEMENT OF THE CASE

On December 22, 1994, petitioner was convicted in California state court of spousal rape, forcible oral copulation, false imprisonment by violence, first degree residential burglary, kidnapping, sexual battery, unauthorized entry of property, and forcible sexual penetration by a foreign object. Petitioner appealed to the California Court

of Appeal, which affirmed the judgment of conviction and sentence on April 15, 1997.

On July 24, 1998, petitioner timely filed a pro se federal habeas corpus petition challenging his conviction. 28 U.S.C. § 2254. Pet. Appx. at 3.

On December 16, 1998, after the one-year limitation period under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") had expired, the magistrate judge issued a report explaining that three of petitioner's eight claims were not exhausted. Petitioner was afforded two options. Under the first option, he could withdraw the unexhausted claims from his petition and proceed with only the exhausted claims. Under the second option, the court would dismiss the petitions "without prejudice," to allow petitioner to return to state court, exhaust his unexhausted claims, and return to federal court. The magistrate judge notified petitioner that if he elected to dismiss the petition, any future federal petition would be subject to the one-year limitation period set forth in the AEDPA and that the time during which the federal petition was pending probably would not toll the limitation period. However, the magistrate judge did not inform petitioner that the limitation period had already run, and therefore a dismissal "without prejudice" was effectively a dismissal "with prejudice." In other words, if petitioner chose the option of dismissing the federal petition and returning to state court to exhaust, he would be time-barred when he attempted to refile his federal petition unless the court found the statute was equitably tolled.

Petitioner opted to have the respective petitions dismissed in order to exhaust his unexhausted claims. In response to the memorandum and order, he filed a "Motion for Dismissal Without Prejudice to Exhaust Claims." On

January 11, 1999, the magistrate judge issued a report recommending that the district court grant petitioner's request for voluntary dismissal. On February 18, 1999, petitioner's habeas petition was dismissed without prejudice as a partially exhausted petition under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1981). Pet. Appx. at 4.

On April 19, 2000, petitioner filed a habeas corpus petition in the California Court of Appeal challenging his state court conviction. The Court of Appeal summarily denied the petition on May 9, 2000. On May 22, 2000 petitioner filed a habeas petition in the California Supreme Court which was denied on August 30, 2000. Approximately two weeks later, on September 18, 2000, petitioner, having exhausted his state remedies, returned to federal court and filed his second pro se federal habeas corpus petition. Pet. Appx. at 4.

The state moved to dismiss contending the petition was time-barred by AEDPA's one year period of limitations. Pet. Appx. at 4. Petitioner argued he had diligently litigated his state petitions in reliance on the magistrate judge's 1999 report that his dismissal without prejudice permitted his return to federal court after exhausting his claims. The district court dismissed the petition as time-barred. Pet. Appx. at 4. As a result, none of the timely-filed and exhausted constitutional claims set forth in the initial petition were ever reviewed.

In an unpublished opinion, the Ninth Circuit found the district court erred in dismissing his first timely-filed mixed habeas petition and, thereby, allowing the limitations period to run while petitioner exhausted his unexhausted claims. Respondent warden conceded that remand

was required based on new circuit precedent. When the district court dismissed the prisoner's federal petition, it did not have the benefit of those decisions concluding that a district court must inform a pro se petitioner that he will be time-barred upon returning to federal court with exhausted claims, that a district court must consider the alternative of staying the petition after dismissal of unexhausted claims, in order to permit the petitioner to exhaust those claims and then add them by amendment to his stayed petition, and that the erroneous dismissal of a mixed habeas petition may result in "extraordinary circumstances" justifying equitable tolling. See, *Kleinhammer v. Roe*, 2003 U.S. App. LEXIS 12659 (9th Cir.2003). The matter was reversed and remanded to the district court to determine whether the petition should be construed as timely. Pet. Appx. at 5.

In consideration of supplemental briefing, the district court issued a report recommending that petitioner's second habeas petition be dismissed as untimely. Pet. Appx. at 5-21. The court found that nothing in its orders had affirmatively misled petitioner for the following reasons: (1) it found the Court had provided petitioner with the option of withdrawing his unexhausted claims and proceeding on the merits of the remaining claims presented in his timely filed first petition; (2) it had warned petitioner that the statute of limitation would apply to any future federal petition and that it was probably not tolled during the time his first federal petition was pending; (3) the fact the court used the words "without prejudice," could not have affirmatively misled petitioner; (4) it found petitioner had delayed in returning to state court to exhaust his state remedies, having waited 14 months after the date on which his petition was dismissed

and 16 months after the date on which the Court informed him his claims had not been exhausted before attempting to present those claims to a state court; and finally, (5) it found petitioner was not entitled to equitable tolling, either due to the court's failure to stay and abey the petition pending exhaustion, or due to extraordinary circumstances beyond petitioner's control.

Petitioner filed a notice of appeal and applied for a certificate of appealability ("COA"). Pet. Appx. at 25, 26. Both the district court and the Ninth Circuit denied the COA requests on the question of whether his federal habeas petition was timely under AEDPA's one-year statute of limitations, 18 U.S.C. § 2244(d). Pet. Appx. at 1, 26, 28. The Ninth Circuit also denied petitioner's motion for reconsideration. Pet. Appx. at 24, 34.

REASONS FOR GRANTING THE WRIT

Even after the Ninth Circuit remanded this case to the district court to determine whether petitioner's writ petition was improvidently dismissed as untimely, the district court failed to follow prevailing decisional law of this Court and of the Ninth Circuit. For the foregoing reasons, it erred when it failed to grant the certificate.

Under *Rose v. Lundy*, 455 U.S. 509, a prisoner who files a mixed petition is faced with a choice. If he wishes to proceed in federal court on his exhausted claims, then unexhausted claims will be purged from the petition so that he can do so. But if he is prepared to forgo immediate federal review, then the petition will be dismissed in its entirety "without prejudice," so that he may fully exhaust his state remedies and then return to federal court for one